

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ANDREI B.,

Claimant,

vs.

GOLDEN GATE REGIONAL CENTER,

Service Agency.

OAH No. 2011020838

DECISION

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter in San Francisco, California, on May 9, 2011.

Claimant's stepmother represented Claimant, who was not present. His father, who is his conservator, was also present.

Richard D. Boyd, Ph.D., Staff Psychologist, represented Service Agency Golden Gate Regional Center (GGRC).

The record closed on May 9, 2011.

ISSUE

Whether Claimant is eligible for regional center services because he suffers from a substantial developmental disability that is related to mental retardation and/or that requires similar treatment.

FACTUAL FINDINGS

1. Claimant, born July 1, 1973, is 37 years of age. Currently, he resides in a group home for persons with mental health issues in San Francisco. Claimant's father is his conservator and SSI payee. He was referred to GGRC by Marilyn Ridgway, his Department of Rehabilitation counselor. GGRC found him not to be eligible for services, he appealed, and this hearing followed.

General background and history: by family report and documents

2. Claimant initially resided in Mendocino County with his mother, father, and sister. He attended a Montessori preschool there. The family moved to San Anselmo, where Claimant attended kindergarten and first grade, and finally to San Francisco. His parents separated when he was ten years old, and his father retained custody of him and of his younger sister.

3. Claimant attended the Waldorf School from second to sixth grade. His father reports that he had a difficult time in school both academically and socially, but that the Waldorf School's philosophy prevented formal testing of students until the seventh grade. Nonetheless, his father arranged for educational testing when Claimant was 12 years old and in the sixth grade. The evaluation was conducted by Nancy P. Schoenemann, MS, at The Learning Disabilities Center of San Francisco.

Claimant was administered the Wechsler Intelligence Scale for Children (WISC) and achieved results in the average range, with a seeming "preference for verbal functioning." In summary, it was concluded that he was "a boy of at least average potential whose academic skills were several years below both his potential and his chronological age." In other words, he was found to be suffering from a learning disability. It was recommended that he be enrolled "in a school for learning disabled children as soon as possible." The report also notes that he appeared depressed and to have feelings of isolation, and suggested that counseling be considered.

4. Based upon the recommendation, Claimant's father enrolled him in the Charles Armstrong School in Belmont, which specializes in educating children of at least average intellectual ability who have dyslexia or similar learning disabilities.

5. When Claimant was almost 16 years old, a psychoeducational evaluation was conducted by Jane McClure, an educational psychologist. The WISC-R was administered and resulted in a full scale IQ of 100, however, his performance IQ was 86. McClure notes that Claimant's "learning disability hinders his achievement in all areas" and that "his disability is of a magnitude that accommodations will have to be made in his learning environment in order for him to be successful. [Claimant's] excellent attitude and his persistence bode well for success in school as long as he is not placed in an educational environment which expects more of him than he can realistically accomplish."

6. The record is somewhat unclear concerning further formal education, in part because his father had difficulty remembering dates. But Claimant also attended Forman School (a boarding school in Connecticut not further described) and then went back to Armstrong. His father reports that Armstrong gave him a diploma, presumably following completion of the 8th grade.

7. When Claimant was almost 18 years old a psychoeducational evaluation was conducted by E. Michael Ellovich, Psy.D., who practices in Connecticut. His scores on the Wechsler Adult Intelligence Scale-Revised (WAIS-R) were: Verbal IQ 108 and Performance IQ 92.

8. Claimant also briefly attended Landmark, a boarding school in Vermont, but left after persuading a teacher to give him money for a bus ticket on two separate occasions. Attempts to complete community college courses have been unsuccessful.

9. In 1994, when he was 21 years old, Claimant was evaluated by licensed psychologist Elliot Henderson. He reviewed previous testing and evaluations and administered tests that included the WAIS-R and Rorschach. In the Summary and Discussion section, Dr. Henderson concludes:

Previous Psycho-Educational records portray a fairly consistent pattern of cognitive and academic functioning. By age twelve, it was identified that [Claimant] was of average intelligence, who possessed attentional deficits and poor academic abilities in reading, writing, spelling, and arithmetic. At that time, he possessed poor decoding skills and also revealed significant difficulty in processing [¶ . . . ¶] Diagnostically, it is the undersigned's opinion that [Claimant] has suffered from a mild version of a pervasive developmental disorder. The primary characteristics have been the longstanding attentional deficit, dyslexia including sequential and processing deficits, and poor psychological and social development. At this point in time, [Claimant] does not possess the academic or social skills to live an independent life.

10. Claimant's father reports that Claimant suffered a mental health breakdown in his early 20's and has received psychiatric care since that time. A June 20, 2002, record from Canyon Manor Mental Health Rehabilitation Center records diagnoses of Bipolar I Disorder, Most Recent Episode Manic, Severe With Psychotic Features and Hallucinogen Abuse. It states that Claimant's "history of contacts with the San Francisco mental health system began in 1993 with outpatient treatment and did not resume again until 1998 with a couple of crisis contacts; 4 days in acute diversion at Schrader and an out patient treatment at the Chinatown North Beach Mental Health Clinic, in addition to current diagnosis he has carried the diagnosis of Schizophrenia, Paranoid Type, Chronic." (*Sic.*)

11. In 2000, an evaluation was conducted by Raymond E. Anderson, Ph.D., who wrote a letter describing his findings to a deputy public defender in Los Angeles. Claimant had been arrested for a misdemeanor offense not otherwise described. Dr. Anderson described the purpose of the examination as rendering an opinion “whether or not [Claimant] was capable of forming the intent to sexually gratify himself at the time of the offense behavior.” He reviewed Dr. Henderson’s report, the arrest report, and other information, and examined Claimant. He described Claimant as “a still severely psychotic young man who has a history of schizophrenic episodes” and found him not competent to stand trial at that time. Further, Dr. Anderson found Claimant’s “performance negatively affected by the combined effects of severe long and short-term memory deficits and by his occasional psychotic confusion. His acute psychotic breaks are usually in response to his failure to take prescribed medication but such episodes may be related to other events or occur spontaneously.” Dr. Anderson recommended confinement in a long-term care facility, with the “most urgent treatment need” to be gaining “insight into his various deficits and disorders.”

12. A letter from Laurie Chen, M.D., states that Claimant was hospitalized at San Francisco General Hospital from May 25 to June 8, 2007. She writes that Claimant “has had a consistent, predictable pattern of medication noncompliance in the community” and that he decompensates quickly absent his medications. She describes a resulting pattern of repeated hospitalization and recommends that he “not retain the right to refuse medications.”

13. On January 30, 2008, Sudha Prathikanti, M.D., completed a Physicians’ Statement in Support of Petition for Reappointment of L.P.S. Conservatorship. Dr. Prathikanti diagnosed Claimant with Schizoaffective Disorder, Bipolar Type. He found Claimant to be “profoundly impaired in his thought process, with tangentiality, distractability, and inability to foresee adverse consequences of his actions.”

On March 29, 2010, Murray A. Shortall, N.P., and John McCoskey, M.D, completed the same form, finding that Claimant was still gravely disabled as a result of a mental disorder, although it is noted that he was compliant with his medication regimen.

14. Documents from the San Francisco Department of Public Health, Mental Health Services, dated April 30, 2010, reveal that Claimant had been assigned a care manager at that time. Claimant is described as “diagnosed with Schizoaffective Disorder, bipolar type” and having “difficulties getting along with people due to his cognitive impairment. Client has agitation issues. Client has hygiene problems.” Objectives include taking care of his personal hygiene and obtaining employment.

15. On April 28, 2010, Claimant was assessed by Anastasya Shepherd, Ph.D., a supervising clinical neuropsychologist with the California Department of Rehabilitation. The purpose of the assessment was to evaluate Claimant “for learning disabilities, overall intellectual functioning, functional limitations and strengths, and to provide vocational training recommendations.” Dr. Sheperd authored an eight-page report of her findings and opinions. Despite the purported purpose, no vocational recommendations were made. She

concludes: “Given current findings, it seems that [Claimant] is unlikely to succeed in a workplace or be able to manage independently. However, he is likely to benefit significantly from appropriate practical training programs in daily living skills and explicit training in social skills. Therefore, I strongly suggest that [Claimant] be referred to [GGRC].”

Dr. Shepherd’s report contains inconsistencies that affect the weight of her opinions. For example, she describes Claimant as having an excellent level of cooperation and motivation and notes that he “put adequate effort into the tasks” of completing testing. And yet, she also reports that he “became overwhelmed easily and refused to comply with overwhelming tasks, such as AVLT and Trails B, so his memory could not be formally assessed.” Her assessment of intellectual functioning is puzzling. Dr. Shepherd interprets test results as showing below average intellectual capacity. She also notes, however, that he refused “to attempt even moderately complex tasks on any tests,” and concluded that, given previous evaluations indicating average intelligence, “current testing reflects poor self-esteem combined with cognitive rigidity rather than below average intelligence.” Later, she opines that Claimant’s current test results “indicate current cognitive functioning in the significantly impaired range, similar to that of people with Mild Mental Retardation.” And finally, Dr. Shepherd opines that “the diagnosis of Pervasive Developmental Disorder, previously provided, is the best description of his symptoms and their progression.” Her assertion that Claimant “has always functioned at the level similar to that of people with mild mental retardation” is not supported by Claimant’s history.

16. Marilyn Ridgway is Claimant’s Department of Rehabilitation counselor. In September 2010 she took over Claimant’s case from another counselor who retired. That other counselor had worked extensively with Claimant to help him obtain employment, but was unsuccessful and believed Claimant was cognitively impaired. Therefore, the first counselor asked Ridgway to refer Claimant to GGRC. Following up on this request, Ridgway referred Claimant to Dr. Shepherd for the above-described evaluation.

Ridgway originally thought that Claimant would be found to be mildly mentally retarded. When Dr. Shepherd instead found Pervasive Development Disorder, it was decided to refer Claimant to another psychologist to determine whether he was autistic.

17. On February 26, 2011, Gary G. Balenstin, Ph.D., examined Claimant. He issued a written report dated March 1, 2011. Claimant refused to engage in some of the testing and argued with Dr. Balenstin, nonetheless, Dr. Balenstin administered numerous tests with a certain amount of success. The WAIS-IV was completed, revealing a Full Scale IQ 76 (low average). Other than this score, which is lower than previous testing, the other test results were consistent with previous results. Dr. Balenstin opined that Claimant was not autistic, but that he has congenital cognitive limitations. In summary, he wrote:

The results of the neuropsychological examination suggest that [Claimant] has specific deficiencies in the areas of executive functioning, suggestive of a frontal lobe syndrome, as well as in short-term audile and visile recall spans. [Claimant] is not

likely to easily recall information said to him or shown to him. He should be encouraged to write down what he needs to remember. In interpersonal situations, [Claimant] is likely to be socially inappropriate and insensitive, as well as not changing his behavior in response to feedback. He also is likely to have something of a quick temper. [Claimant] should be viewed as a person who tends to be rather concrete in what he understands and how he responds. Prognosis poor for substantial change in the next 12-24 months.

18. Ridgway has worked for ten years with GGRC clients, and believes that Claimant functions like many of these clients, in other words, like someone who is mentally retarded. She notes that Claimant has difficulty with self-care. Sometimes he arrives for appointments not physically clean. He has difficulty learning and managing daily life. Ridgway must go over information several times with Claimant, explaining it in different ways. Claimant requires step-by-step instruction and “needs to be brought back to the task at hand.”

Since July 2008, different counselors have attempted to find employment for claimant, but have been unsuccessful. He has been referred to different programs, but has had difficulty with punctuality and attendance. He seems unable to stay focused, take instruction, and produce work in an assembly-type job. Claimant was excited about one possibility initially, but was uncomfortable that the program was located in a church. Ridgway is continuing to work with Claimant to find an appropriate vocational situation.

GGRC staff evaluations

19. GGRC’s assessment began with an evaluation by Kelly Blankenship, a licensed clinical social worker. She met with Claimant and his father at Claimant’s group home. Blankenship noted that the two men disagreed somewhat frequently about Claimant’s abilities. According to his father, Claimant overstates his abilities. For example, when asked about cooking skills, Claimant reported that he can cook chicken, spaghetti, and fish. But his father describes his skills as limited to heating up food in a microwave, with a poor ability to follow instructions for doing so.. Blankenship testified that she believes his father’s version of Claimant’s abilities.

20. Claimant is able to order food at a fast food restaurant, and insists on having a McDonald’s hamburger daily. He is not able to budget his money in the long term and is provided cash in small increments by his father. A strength for Claimant is using public transportation. He travels all over San Francisco and has taken the bus to Los Angeles and Fresno. From those locations, however, he called his father to obtain a ticket to return home.

21. Claimant has never been consistently employed. He was fired from a job as a stock boy when a teenager and an attempt at working as a janitor through the Department of Rehabilitation was unsuccessful.

22. Claimant receives SSI, SSA, Medi-Cal and Medicare benefits. He receives group and individual therapy through the Family Service Agency. Claimant told Blankenship that he takes Zyprexa, Depakote, Valporic Acid and Metropolo.

23. Neil Hersh, Ph.D., is a staff psychologist. Prior to his employment at GGRC, he conducted assessments for another regional center and for the Department of Rehabilitation. He reviewed information about Claimant, interviewed him, prepared a written report and testified at hearing. Dr. Hersh opined that Claimant's only cognitive impairment is a learning disability. His intelligence scores are well above the mentally retarded range, and the lower of those scores followed the development of a serious psychiatric disorder. Dr. Hersh observed Claimant to have tangential thinking and notes that the medications he takes are psychotropic and assist in mood stabilization, sleep and controlling impulsive behavior. Overall, Claimant's symptoms are consistent with a major psychiatric disorder, and he is functioning consistently with that diagnosis.

24. Theresa Keyes-Osantowski, M.D., is a board certified pediatrician with a background in genetics. She has been a staff physician at GGRC for 21 years. Dr. Keyes-Osantowski reviewed all of the available reports and documents concerning Claimant, and met with other staff and Claimant. Of note in her interview of Claimant is his report that he runs for hours each day and says that walking is his job. Dr. Keyes-Osantowski believes Claimant's cognitive potential is in the average range and that he has a strong history of mental illness.

25. It is the opinion of the GGRC assessment team, consisting of Blankenship, Dr. Hersh and Dr. Keyes-Osantowski, that Claimant is not substantially handicapped by a condition similar to mental retardation that requires similar treatment. Therefore, a letter informing Claimant that he is not eligible for regional center services was issued by GGRC.

Other evidence

26. Claimant's father testified at hearing about his experiences with Claimant over the years. He believes he was in denial regarding the seriousness of Claimant's problems when he was growing up. He recalls that Claimant had many problems with motor skill development. He could never learn to play catch and even today, does not know how to carry things. Claimant has always been extremely awkward. It took him about two years to learn to ride a bicycle.

Claimant did learn to drive and at one point had a driver's license. Claimant's father taught him and supported him in driving, until he realized how unsafe it was. Also, Claimant forgot to put oil in his car and it "blew up."

One reason that Claimant's father maintains him in the group home is that they ensure that he takes his medications. They are administered in oral form, so that staff can tell if he takes them. Claimant has been compliant with his medications for about three years. When on them he "acts kind of normal." When he has not had them for about three days, there is some "hyper conversation."

27. Sarah McCuskey is a retired nurse practitioner. She met Claimant when he attended the Waldorf School with her daughter. The class had only 15 children, and the families got to know each other very well. McCuskey was very involved with the school as a volunteer and remembers Claimant well. She recalls that the other children "kind of shied away from him like he was a little strange." Claimant would engage in conversation, but then say something odd, laugh and walk away. Claimant did not engage in sports and seemed to have trouble connecting with other children. McCuskey's daughter also attended Armstrong school with Claimant. They rode the bus together, and the bus rides were difficult. Claimant would pick fights and could be rather mean to other students.

28. Jacob Aginsky was Claimant's classmate at the Waldorf School from second to sixth grade. He and his mother, Carrie Aginsky, wrote letters describing their memories of Claimant. Jacob recalls that Claimant was frustrated at being left out socially and academically. He wrote that Claimant "was always good at masking his lack of understanding in humor but the underlying frustration could likely turn to agitation or anger, and I can recall several instances where our play would end in some big fight leaving me bewildered about how or why it had taken that turn." Carrie described Claimant as behaving in an agitated fashion "and it was difficult for him to sit still." Both she and her husband tried to have extended conversations with Claimant, but it was never possible. They ran into Claimant a few years ago, and he recognized them, was polite, and asked about Jacob. Both Jacob and Carrie hope that Claimant can receive needed assistance.

29. Letters also were received in evidence from two of Claimant's teachers at the Waldorf School. Jeff Kofsky was Claimant's teacher from second through sixth grade. He reports that Claimant "suffered from a number of disabilities that created tremendous challenges for him and put him at a great disadvantage." These included deficits in his gross and fine motor skills. He needed considerable help in projects involving those skills. Further, Kofsky reports that Claimant "was hyperactive, unable to focus or take initiative, and he suffered from considerable intellectual challenges that interfered with his ability to learn." Even with remedial work and help he was not able to keep up. In addition, socially "he was always on the outside and didn't seem to comprehend what to do to be a part of his peer group."

Kathy Gower, Ph.D., taught the handwork curriculum and was an afterschool coordinator. She taught Claimant knitting, crocheting and simple sewing. She reports that Claimant made great efforts, but had great difficulty. Also, she observed that he did not have a preference for using his right or left hand, had difficulty following directions and walking in a straight line. Gower notes that Claimant transferred to another school after it became clear that he could not keep up with his classmates and was not “able to work independently or focus for any length of time.”

30. Claimant’s older sister wrote a letter dated May 6, 2011. She describes growing up and living with her brother, until he went away to boarding high school. She recalls much verbal fighting and arguing. She reports that Claimant “often had difficulty making eye contact and focusing in one direction of thought. He often seems so distracted and it felt difficult to emotionally connect with him.” His sister believes that Claimant will need support for the rest of his life and hopes he can get that help.

APPLICABLE LAW

1. The governing law is found in Welfare and Institutions Code section 4500 et seq., commonly known as the Lanterman Act. At section 4501 the Legislature declares the State of California’s responsibility for persons with developmental disabilities. The Supreme Court has stated that the purpose of the Act:

[I]s two-fold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.

Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384.

2. The Act does not apply to every citizen who suffers a physical or mental handicap and is in need of assistance. Rather, a person must meet specific criteria as described in section 4512, subdivision (a):

(a) ‘Developmental disability’ means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely

related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

3. A developmental disability not resulting from one of the four listed conditions is commonly called the “fifth category.” Claimant has applied pursuant to this category, which provides eligibility despite normally disqualifying IQ scores where it can be shown that an individual is in fact functioning at an adaptive and cognitive level as if he or she were mentally retarded, and/or that the services he or she requires are consistent with those needed by a mentally retarded individual. It is not necessary that a claimant present as if mentally retarded in every aspect. If that were the case, there would have been no need to specify additional criteria for acceptance. However, the condition must be substantially disabling, that is, one that causes a very major impairment, and it must have originated prior to age 18.

4. Further guidance in assessing eligibility is found in title 17, California Code of Regulations, section 54001:

(a) ‘Substantial Handicap’ means a condition which results in major impairment of cognitive and/or social functioning. Moreover, a substantial handicap represents a condition of sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential.

(b) Since an individual’s cognitive and/or social functioning are many-faceted, the existence of a major impairment shall be determined through an assessment which shall address aspects of functioning including, but not limited to:

- (1) Communication skills;
- (2) Learning;
- (3) Self-care;
- (4) Mobility;
- (5) Self-direction;
- (6) Capacity for independent living;
- (7) Economic self-sufficiency.

The seven areas are examined to assist in the determination of whether the applicant might be a person suffering from a condition similar to or requiring services similar to mental retardation. Although intelligence testing is an important part of the analysis, it contributes only a portion of the picture. Evidence from all domains relevant to actual ability to function in society must be examined. The successful applicant would then qualify for services under the “other” or “fifth” category.

5. Additional information regarding eligibility is found in title 17, California Code of Regulations, section 54000, subdivision (c). It provides that where the handicapping condition is solely physical in nature and not associated with neurological impairment, is solely due to a psychiatric disorder, or consists solely of learning disabilities, it is not a developmental disability for the purposes of the Lanterman Act.

DISCUSSION

Claimant's family would like him to have the assistance provided by GGRC and Claimant could certainly use assistance. The situation is a heart-breaking one for his family, including his father, who has clearly done everything in his power to help his son. It is hoped that with the assistance of mental health professionals and vocational expertise Claimant can find his way to a productive life. However, the evidence is insufficient to demonstrate that Claimant qualifies for regional center services pursuant to the Lanterman Act.

The weight of the evidence supports the conclusion that Claimant's adaptive behavior deficits arise from his psychiatric disorders, and not a developmental disability. Claimant does not have a condition that is closely related to mental retardation. He has average general intellectual functioning. Claimant does have deficits in adaptive functioning, but it was not shown that these deficits result from developmental delays. Rather, his early difficulties, prior to age 18, were the result of a severe learning disability. After age 18, he has been diagnosed with various psychiatric disorders. These disorders require mental health treatment, including medication. Although both the mentally ill and the developmentally delayed need assistance with living independently, the basis for these needs are different and the Lanterman Act does not include services for persons whose impairments are at heart psychiatric.

LEGAL CONCLUSION

Claimant did not demonstrate that he suffers from developmental disabilities as defined by the Lanterman Act. It was not established that he functions in the community like a mentally retarded person. Rather, he is a person with at least low-average cognitive abilities, psychiatric problems, and severe learning disabilities. Therefore, Claimant is not eligible to receive regional center services by reason of a condition found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. Accordingly, he is not eligible for regional center services and his appeal shall be denied.

ORDER

Claimant Andrei B.'s appeal is denied.

DATED: May 19, 2011

MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.